No. 21,629

United States Court of Appeals

For the Ninth Circuit

STEWART L. UDALL, Secretary of the Interior, and STATE OF ALASKA,
Appellants,

vs.

ANDREW J. KALERAK, et al.,
Appellees.

On Appeal from the United States District Court, District of Alaska

REPLY BRIEF FOR APPELLANT STATE OF ALASKA

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CONSIDERATION OF THE POLICY ADVANCED BY THE SEGREGATION DOCTRINE DEMANDS ITS APPLICATION TO THIS CASE.

The salutary purpose of the segregation doctrine, which appellees seek to defeat, is to accord all persons an equal opportunity to apply for a portion of the public domain by establishing justifiable reliance upon the records of the land offices. In seeking to discredit the numerous cases dealing with widely varied fact situations which support the policy of the segregation doctrine, the appellees cite *Northern Pacific Ry. Co. v. DeLacey,* 174 U.S. 622, 43 L.Ed. 1111 (1898); and

Oregon and California Ry. Co. v. United States, 190 U.S. 186, 47 L.Ed. 1012 (1902). A review of both cases discloses that they are not in discord with either the policy of the segregation doctrine nor the application of the doctrine to this case.

In the *DeLacey* case, *supra,* one Flett filed a declaratory statement of intent to purchase certain lands in 1869. Applicable statutes required Flett to file further proofs and make payment for the land within 30 months. Flett, however, failed to do either and soon left the land. Some fourteen years later in 1884, with Flett's final proof approximately thirteen years past due, a railroad filed its map of definite location which encompassed the land in question.

The court stated that if Flett had made the required proofs and payment, that fact would have been a *matter of record* and stated:

> "In such a case as this, where the forfeiture occurs by the expiration of the thirty months within which to make proof and payment, *the record shows* that the claim has expired; . . . . [Emphasis added.] 174 U.S. at p. 633.
>
> "When no proof and no payment have been made within the time provided by law, *the record will show that fact,* and that the right of the claimant has expired and the claim itself has ceased to exist." [Emphasis added.] 174 U.S. at p. 637.

The court held that where a simple reference to the record would disclose that a claim had expired, in this instance fourteen years previously, the claim would

ıot be afforded the same segregative effect as a claim ubject to cancellation due to facts outside the record.

In *Oregon and California Ry. Co. v. United States, upra,* a notification was filed by one Hines on certain ınd under the Oregon Donation Act. That Act re- uired that after filing the original notice, (1) fur- her notice of the precise location be filed within three ıonths, (2) proof of settlement and commencement f cultivation be filed within twelve months, and (3) ›roof of continual residence and cultivation be filed ;ithin four years. Fifteen years after Hines' initial ling, a railroad company claimed the land. A review f the record at the time of filing by the railroad in- icated that no proof of settlement and cultivation ad ever been filed by Hines. As a consequence the ourt concluded:

> We think that, considering the fact that fourteen years had elapsed since the original settlement the railroad company would be authorized to infer that the donee had abandoned the land, as in fact appears to have been the case. 190 U.S. at p. 186.

Thus, in both *DeLacey, supra,* and *Oregon and Cali- ornia, supra,* it appears that the *record disclosed* ufficient facts, by way of total noncompliance with ›rocedural steps for fourteen years and fifteen years espectively, to demonstrate that the land-seeking pub- ic could determine the availability of the land. Fur- her, in *DeLacey,* the status of the original claim was ›f a type that the land office treated as having no egregative effect.

in rejecting the appellees' selections of land so heavily encumbered by the prior application of the State of Alaska which advanced the policy of the *Northern Lumber* case.

The remainder of appellees' argument against the segregation doctrine is wholly untenable. The suggestion that the segregation doctrine had its chief application in cases involving railroad grants is unsupported speculation. The argument advanced by appellees that the District Court should be affirmed because the State of Alaska can select other land, is hardly persuasive, since the appellees can also select other lands, lands which are not so entirely unsuitable for homesteading, while only the mountain watershed lands here in issue can provide the vital water supply sought to be protected by the State in the public interest.

Finally, the appellees repeat their erroneous argument that to afford segregative effect to the State of Alaska's application will be to give to the State an additional preference right to that granted by the Statehood Act. Whether the application of the State of Alaska, or any application, is afforded segregative effect has no bearing whatsoever on the final validity of that application. The reported cases make this fact clear.

The conclusion is inescapable that the Land Office records disclosed a viable, active application by the State of Alaska which was treated as valid in all respects by the Bureau of Land Management and that the lands encompassed were not available for filing.

If the State of Alaska's selection was invalid and if all members of the public are to be afforded an equal opportunity to obtain the lands in question, the State's application must be afforded segregative effect.

A contrary result would grant to the appellees a preference right over all other members of the public.

Finally, appellees' argument overlooks the basic purpose of, and the public policy underlying, the entire official transaction in this case, which they seek to frustrate by reliance on minor procedural technicalities. Upon the face of the entire record it must have been obvious to all concerned that what was attempted here was not the restoration of reserved land to public domain status, followed by routine selection for some purpose of a dignity no higher than appropriation by any other claimant of land. Rather what occurred here was an effort to transfer the public trusteeship of the vital watershed for Alaska's largest urban area from one sovereign to another, without disturbing the reserved character of the land. The acts of restoration and selection thus were mere procedural formalities and the egregious error committed by the Court below was to confound form and substance and thereby to defeat, unnecessarily, a vital public interest fully disclosed by the record to all who cared to see.

THE AMENDMENT THEORY OF THE SECRETARY OF THE INTERIOR WAS ENTIRELY REASONABLE SINCE IT MERELY RECOGNIZED THE NEEDLESSNESS OF RESUBMITTING A BRIEF LETTER AT A TIME WHEN THERE WERE NO INTERVENING RIGHTS TO BE CONSIDERED.

As has been demonstrated earlier (see Appendix, Brief of Appellant Secretary of the Interior), the original application of the State of Alaska was comprised of a single letter with an attached exhibit listing the lands selected. The amendments, filed during the statutory preference period and some two years prior to appellees' entries, were merely additional lists of land which were submitted with express reference to the original application letter. The Secretary of the Interior decided that the amendments filed during the State of Alaska's statutory preference period constituted a refiling of the original application. The Secretary of the Interior held, in effect, that it would have been a useless formality to require the State of Alaska to retype its letter of application. It would have been the merest pedantry to insist on repeating that which had already been done where no other claimants had intervened.

The original application and its amendments were all part of a single record when the appellees initiated their interest in part of the lands some two years later. They could not have been prejudiced in any way by the administrative method of handling of the State's application some two years before.

THE STATE OF ALASKA MAINTAINED SOLE AND EXCLUSIVE CONTROL OVER ALL SELECTIONS OF LANDS UNDER THE STATEHOOD ACT.

There is no evidence whatsoever for appellees' allegation that the State of Alaska alienated or bargained away its authority to select the lands here in issue. The selection was made by the State in its own name and was not subject to any contract, conveyance or other transaction with the City of Anchorage. Stated otherwise, if the State had not desired the lands in issue, it was in no way obligated to select them.

The lands in question were initially subject to Public Land Order No. 576, 14 F.R. 1614 for the protection of the water supply of the Anchorage area, the State's largest concentration of population and industry. The entire series of transactions which are before the Court in this appeal was designed and intended to continue the protection of this watershed. It is of no moment that the City of Anchorage, a political subdivision of the State, shared the interests and desires of the State of Alaska to protect the public watershed. It was the sole authority of the State of Alaska by which the selection was made and the appellees' brief contains only an entirely unsupported assertion to the contrary.

THE SELECTION BY THE STATE OF ALASKA WAS A NECESSARY AND BENEFICIAL SELECTION FOR ALL ALASKANS.

Appellees' assertion that the selection here in issue constituted a violation of Equal Protection is wholly unsupported by the facts and no applicable authority is cited therefor. There was no discrimination because selection of lands anywhere in Alaska is of benefit to all Alaskans.

The purpose of the land grants of the Alaska Statehood Act is to provide for Alaska's total economic and social development. Contrary to appellees' suggestion that all lands selected are to be sold or leased to provide revenue, it is reasonable to assume that some lands will be retained to protect mineral, wildlife and other natural resources. Some lands will be selected and retained in order to protect essential water resources, even though such lands may be completely unsuitable for production of any revenue whatsoever.

It borders on the frivolous to argue that Alaska discriminates against all non-Anchorage Alaskans by selecting some 30,000 acres of its 104,000,000 acre grant for the purpose of protecting the water supply of an area which contains more than one-half of Alaska's total population.

CONCLUSION

The decision of the Secretary of the Interior, affirming the action of the Anchorage Land Office, is supported by the decisions of the federal courts which have considered similar cases and gives effect to the policies established by those courts. Moreover, the administrative procedures followed here were designed to carry out a public purpose superior to the acquisitive interests of appellees.

In order to effectuate those policies and purposes, the decision of the District Court should be reversed.

Dated, Juneau, Alaska,
December 12, 1967.

Respectfully submitted,
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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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